**IN THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF OKLAHOMA**

**STATE OF OKLAHOMA, ex rel. W.A. DREW EDMONDSON, in his capacity as ATTORNEY GENERAL OF THE STATE OF OKLAHOMA AND OKLAHOMA SECRETARY OF THE ENVIRONMENT C. MILES TOLBERT, in his capacity as the TRUSTEE FOR NATURAL RESOURCES FOR THE STATE OF OKLAHOMA** **PLAINTIFFS**

**v.** **CASE NO.: 05-CV-00329 TCK –SAJ**

**TYSON FOODS, INC., TYSON POULTRY, INC., TYSON CHICKEN, INC., COBB-VANTRESS, INC., AVIAGEN, INC., CAL-MAINE FOODS, INC., CAL-MAINE FARMS, INC. CARGILL, INC., CARGILL TURKEY PRODUCTION, LLC, GEORGE'S, INC., GEORGE'S FARMS, INC., PETERSON FARMS, INC., SIMMONS FOODS, INC. and WILLOW BROOK FOODS, INC.** **DEFENDANTS**

## TYSON FOODS, INC.'S SECOND MOTION TO COMPEL

Defendant Tyson Foods, Inc. ("Tyson") moves this Court pursuant to FED. R. CIV. P. 37(a) to enter an order compelling Plaintiffs properly to respond to requests for production served on April 25, 2007.

## I. INTRODUCTION

Plaintiffs commenced this lawsuit more than two years ago. Plaintiffs allege that reckless and illegal conduct by Tyson and other poultry companies has contaminated the soils, water, sediment and biota throughout more than 1,000,000 acres of the Illinois River Watershed ("IRW"). Plaintiffs further allege that this contamination poses an imminent and substantial

endangerment to human health. *See* Second Amended Complaint ("SAC" or "Complaint") ¶¶ 1, 6-9, 31, 50-57, 95, 121, 126, 131, 135 and 138 (Dkt. No. 1215). The Complaint contains sprawling generic allegations and intemperate rhetoric but is bereft of facts and details regarding the precise wrongdoing of each Defendant and Plaintiffs' alleged injuries.

Since this lawsuit was filed, the defendants have diligently sought to discover the scope and nature of Plaintiffs' claims and the factual basis, if any, for their allegations. For more than two years, Plaintiffs have intransigently refused to produce or identify the "proof" they baldly claim to possess to support those claims. Plaintiffs' refusal to comply with their discovery obligations under the Federal Rules has been deliberate and ceaseless. Plaintiffs' willful discovery violations have resulted in numerous discovery disputes, *see, e.g.,* Cobb-Vantress First Motion to Compel (Dkt. No. 743); Tyson Defendants Motion to Compel (Dkt. No. 1019); Cargill Motion to Compel (Dkt. No. 902); Cal-Maine Motion to Compel (Dkt. No. 1054), and several Orders from this Court. *See, e.g.,* January 17, 2007 Order (Dkt. No. 1016) (ordering Plaintiffs to produce sampling data); February 26, 2007 Order (Dkt. No. 1063) (ordering Plaintiffs to respond to Tyson Defendants' interrogatories), and May 17, 2007 Order (Dkt. No. 1150) (ordering Plaintiffs to respond to Cargill Defendants' interrogatories and requests for production).

Notwithstanding this Court's orders and the clear requirements of the Federal Rules, Plaintiffs continue to obstruct all legitimate discovery. Defendants have been severely prejudiced by Plaintiffs' discovery abuse since this case was filed. This Court's Orders to date have not chastened Plaintiffs, who flout those Orders as readily as they disregard the Federal Rules. As a consequence, this Court should order Plaintiffs to produce the documents Tyson

requests and give notice to Plaintiffs that further discovery abuses will result in severe sanctions, including the dismissal of claims, pursuant to FED. R. CIV. P. 37.

## II. PLAINTIFFS' OBJECTIONS AND RESPONSES TO TYSON'S APRIL 25, 2007, REQUESTS FOR PRODUCTION

This motion is necessitated by Plaintiffs' most recent discovery abuse. On March 6, 2007, the Defendants served Plaintiffs with Requests for Admission ("RFA"). In responding to some of the Requests for Admission, Plaintiffs represented that they possessed specific evidence to support their claims. On April 25, 2007, Tyson served Plaintiffs with a Request for Production requesting the production of all such evidence.

Plaintiffs served their "responses" and objections to the Request for Production on July 2, 2007.[1] Plaintiffs' response to each request is deficient.[2] Some of the more offensive responses to the requests:

| RFP# | Documents Requested | Plaintiffs' Objection and Response |
|---|---|---|
| 1 | Documents (including reports, publications, memoranda, letters, meeting minutes, etc.) that support Plaintiffs' claim in its RFA responses that "the listing of elemental chemicals on various EPA lists used in CERCLA is intended to include compounds of such chemicals for purposes of determining whether a | Plaintiffs asserted attorney-client privilege or work product protection.<br><br>Plaintiffs produced no documents. |

[1] In compliance with LCvR 37.2(d), the verbatim discovery requests, responses and objections which are the subject of this motion are attached hereto as Exhibit 1 and incorporated herein by reference.

[2] During the meet and confer session, Plaintiffs acknowledged their responses to nine of the Requests for Production – RFP Nos. 4, 19, 21, 22, 23, 24, 25, 27 and 31 – are deficient and agreed to supplement their responses to those requests by August 24, 2007. On August 24, 2007, Plaintiffs' counsel requested additional time until September 10, 2007, to supplement these responses. Tyson agreed. Tyson reserves its rights with respect to Plaintiffs' supplemental responses to these nine requests.

| RFP# | Documents Requested | Plaintiffs' Objection and Response |
|---|---|---|
| | chemical/chemical compound is a hazardous substance."[3] | |
| 2 | Copies of the "issued orders" and "agreements" that Plaintiffs claimed in its RFA responses the State had entered into for the purpose of improving wastewater treatment facilities that discharge into the IRW. | Plaintiffs objected citing burden and asserted attorney-client privilege or work product protection.<br><br>Plaintiffs provided two untitled spreadsheets describing nitrogen and phosphorous discharges in other watersheds and referred Tyson to the 212 boxes of "documents previously produced at the Oklahoma Department of Environmental Quality and the Oklahoma Water Resources Board." |
| 5 | Documents supporting Plaintiffs' statement in its RFA responses that "the constituents of poultry litter have been found throughout the IRW." | Plaintiffs objected citing burden and asserted attorney-client privilege or work product protection.<br><br>Plaintiffs referred Tyson to their "agency productions" consisting of more than 513 boxes of documents, 1 hard drive, and 25 CDs, which comprise Plaintiffs' "Court Ordered Scientific Productions." |
| 7 | The evidence that Plaintiffs claim to possess in RFA responses regarding the amount of poultry litter applied in the IRW by contract growers for each defendant. | Plaintiffs objected citing burden and asserted attorney-client privilege or work product protection.<br><br>Plaintiffs referred Tyson to more than 18,000 pages of "grower and applicator records" previously produced from ODAFF, and 12 boxes of documents, 1 hard drive and 25 CDs which comprise Plaintiffs' "Court Ordered Scientific Productions." |
| 20 | Documents related to the "ongoing Natural Resource Damage Assessment" which the State is required pursuant to 43 C.F.R. Part 11 to conduct with public notice and participation. | Plaintiffs asserted attorney-client privilege or work product.<br><br>Plaintiffs refused to produce these documents until their "expert and damage |

[3] Tyson's counsel advised Plaintiffs that Tyson was not asking Plaintiffs to "brief" a "legal theory." Tyson explained that this request sought only the production of documents such as reports, publications, memoranda, letters and meeting minutes that support the State's position on this claim. *See* Ex. 2, July 3, 2007, Letter from R. George to D. Riggs.

| RFP# | Documents Requested | Plaintiffs' Objection and Response |
|---|---|---|
| | | reports" are due under the current scheduling order. |
| 28 | Documents that reflect or reference costs that Plaintiffs claim to have incurred in hauling poultry litter out of the IRW in RFA responses. | Plaintiffs objected citing burden and asserted attorney-client privilege or work product protection.<br><br>Plaintiffs referred Tyson to the 147 boxes of documents "produced at the Oklahoma Conservation Commission and the Office of the Oklahoma Secretary of the Environment." |
| 29 | Documents that reflect or reference costs that Plaintiffs claim to have incurred in managing and disposing of poultry litter within or outside of the IRW in RFA responses. | Plaintiffs objected citing burden and asserted attorney-client privilege or work product protection.<br><br>Plaintiffs imply that the 147 boxes of documents "previously produced at the Oklahoma Conservation Commission and the Office of the Oklahoma Secretary of the Environment" are responsive. |
| 30 | Copies of notices, advisories and written communications that comprise the instances in which Plaintiffs claim they had advised people not to swim in the waters in the IRW due to pollution or water quality conditions. | Plaintiffs objected citing burden and asserted attorney-client privilege or work product protection.<br><br>Plaintiffs refer Tyson to two "fact sheet" publications, which are not specific to the IRW, five web sites, "sliding filing cabinets" at OWRB and the "OSRC Log 2-13". |
| 33 | Copies of notices, advisories or written communications that comprise the instances in which Plaintiffs claimed they had advised people not to eat fish from the waters in the IRW due to pollution or water quality conditions. | Plaintiffs objected citing burden and asserted attorney-client privilege or work product protection.<br><br>Plaintiffs refer Tyson to an ODEQ "fact sheet" publication on mercury levels which is not specific to the IRW. |

Tyson seeks relief from the Court because Plaintiffs refuse to provide straightforward responses to discovery as required by the Federal Rules. Plaintiffs' "responses" to the requests for production reflect an utter disregard for the letter and spirit of Rule 34. Moreover, Plaintiffs'

references to hundreds of boxes of documents rather than producing responsive documents is a flagrant and willful violation of this Court's February 26, 2007, Order (Dkt. No. 1063) and May 17, 2007, Order (Dkt. No. 1150). Tyson has conferred with Plaintiffs pursuant to FED. R. CIV. P. 37(a)(2)(B) in a good faith effort to resolve this discovery dispute, but Plaintiffs continue to refuse to comply with their discovery obligations and this Court's Orders.

## III. ARGUMENT

Plaintiffs' "responses" to Tyson's Request for Production reflect the same hubris and spirit of defiance that necessitated this Court's prior three discovery orders. Notwithstanding those three Orders, Plaintiffs continue to refuse to produce the documents and evidence they assert support their claims. Incredibly, Plaintiffs also claim that the documents sought by Tyson are privileged, but they refuse to describe those documents on a privilege log. Finally, in direct contravention of this Court's February 26, 2007, Order (Dkt. No. 1063) and May 17, 2007, Order (Dkt. No. 1150), rather than produce responsive documents, Plaintiffs cavalierly refer Tyson to the mountain of documents included in their "agency productions" and their "court-ordered scientific productions." Tyson and the other Defendants are being severally prejudiced by Plaintiffs' contumacious disregard of their obligations under the Federal Rules and this Court's Orders. This Court should order Plaintiffs to produce the requested documents and make clear that further violations will result in severe sanctions pursuant to Rule 37.

### A. Plaintiffs' Blanket Claims of Privilege or Work-Product are Improper

Plaintiffs' concealment of evidence under sweeping (and unsubstantiated) claims of privilege has become a hallmark of Plaintiffs' discovery abuses in this case. *See, e.g.,* Cobb-Vantress First Motion to Compel (Dkt. No. 743); January 17, 2007, Order (Dkt. No. 1016). Plaintiffs apparently believe their *ipse dixit* claims of privilege or work product provide them

license not to produce documents they deem unhelpful to their case. That, of course, is not the law.

A party's "bald assertion that production of requested information would violate a privilege is not enough." *Miller v. Doctor's General Hospital*, 76 F.R.D. 136, 140 (W.D. Okla. 1977). "It is well settled that when a party withholds documents or other information based on a privilege or work product immunity, the 'party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing the information itself privilege or protected, will enable other parties to assess the applicability of the privilege or protection.'" *DirectTV, Inc. v. Pucenelli*, 224 F.R.D. 677, 681 (D. Kan. 2004) (*quoting* FED. R. CIV. P. 26(b)(5)). "[A] general claim of privilege, be it work product or attorney client, is an inadequate response to a discovery request." *Obiajulu v. City of Rochester*, 166 F.R.D. 293, 295 (W.D. N.Y. 1996). *Accord Taydus v. Cisneros*, 902 F. Supp. 288, 297 (D. Mass 1995); *Moses v. State Farm Mutual Automobile Ins. Co.,* 104 F.R.D. 55, 57 (N.D. Ga. 1984). "A 'blanket claim' as to the applicability of the privilege/work product doctrine does not satisfy the burden of proof." *Id. See also Pippenger v. Gruppe,* 883 F. Supp. 1201, 1212 (S.D. Ind. 1994) (plaintiffs bald assertion of work product was insufficient); *United States v. El Paso Co.,* 682 F.2d 530, 539 (5th Cir. 1982) (attorney client privilege "may not be tossed as a blanket over an undifferentiated group of documents"). This Court's Local Rule 26.4 specifically requires that the information necessary to evaluate a claim of attorney-client privilege or work product protection must be provided in "a privilege log." N.D. OKLA. LCVR 26.4.

Plaintiffs' responses to each of the 33 requests for production include blanket assertions of "attorney-client privilege or work product protection." *See* Ex. 1. Plaintiffs brazenly claim

that even requests for purely factual documents such as permits, public advisories and expense records relating to poultry litter hauling are exempt from discovery based on the attorney-client privilege or work product doctrine. *See* Ex. 1 (Pltfs. Responses to RFP Nos. 19, 28, 30, 33). Plaintiffs, however, do not provide a description of the nature of the documents which they claim are privileged. Plaintiffs have provided none of the information that would allow Tyson or the Court to evaluate their blanket assertions of privilege or work product. In fact, Plaintiffs have refused to provide a privilege log as required by Local Rule 26.4.

Plaintiffs' blanket claims of privilege are improper. Plaintiffs' claims of privilege should be stricken and the requested documents ordered produced.

**B. Plaintiffs' Burden Objections are Unfounded**

It is well settled that a party resisting discovery on the ground that it is unduly burdensome "has the burden to show not only undue burden or expense, but that the burden or expense is unreasonable in light of the benefits to be secured from the discovery." *Cardenas v. Dorel Juvenile Group, Inc.*, 232 F.R.D. 377, 380 (D. Kan. 2005) (citing *Swackhammer v. Sprint Corporation*, 225 F.R.D. 658 (D. Kan. 2004); *Hammons v. Lowe's Home Ctr.*, 216 F.R.D. 666 (D. Kan. 2003)). "This burden typically imposes an obligation on the objecting party to provide an affidavit or other evidentiary proof of the time and expense involved." *Cardenas*, 232 F.R.D. at 380 (citing *Waddell & Reed Fin., Inc. v. Torchmark Corp.*, 222 F.R.D. 450, 454 (D. Kan. 2004)). Objections that are not explained "are too general to be addressed in any meaningful way by the Court", and, therefore must be overruled. *Hawkins v. Fulton County,* 95 F.R.D. 88, 94 (N.D. Ga. 1982). *See also KAR Products, Inc. v. Avnet, Inc.,* 78 F.R.D. 204, 207 (N.D. Ga. 1978); *Burns v. Imagine Films Entertainment, Inc.,* 164 F.R.D. 589, 593 (W.D. N.Y. 1996) (discovery objections must be specific and detailed); *Roesberg v. Johns-Manville, Corp.,* 85

F.R.D. 292, 296-97 (E.D. Pa. 1980) (a party may not recite the "Familiar litany of general objections"); *Momah v. Albert Einstein Medical Center,* 164 F.R.D. 412, 417 (E.D. Pa. 1996).

In 21 of their "responses," Plaintiffs refuse to produce evidence based on the naked assertion that "the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, and the importance of the proposed discovery in resolving the issues." *See* Ex. 1, Pltfs. Responses to RFP Nos. 2, 3, 5, 8 – 19, 28–33. Plaintiffs have not provided any evidentiary proof to substantiate their claim that responding to any of the 21 document requests would impose an undue burden or expense.

Remarkably, Plaintiffs claim that the benefit of discovery on topics central to this lawsuit -- e.g., that "the constituents of poultry litter have been found throughout the IRW" and that Plaintiffs have incurred costs in managing and disposing of poultry litter within the IRW -- is outweighed by the burden of producing the information. *See* Ex. 1, Pltfs. Responses to RFP Nos. 5 and 29. Plaintiffs plainly are engaged in a bad faith litigation by ambush strategy. This Court should not countenance such gamesmanship.

Rule 26(a)(1)(c) expressly provides that the damages, documents and information sought by Tyson are discoverable.[4] Plaintiffs claim hundreds of millions of dollars in damages as a result of Defendants' conduct. Plaintiffs refuse, however, to produce a single document that supports even one dollar of damage suffered by the State. Unless and until Plaintiffs disclose the amount of monetary damages, and the evidence to support such damages they are seeking in this lawsuit, it is absurd for them to claim the "amount in controversy" does not justify discovery.

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[4] Plaintiffs' refusal to allow discovery on the nature and amount of their damages was the subject of a prior order by this Court. *See* 2/26/07 Order at p. 11 ("Plaintiffs are obligated to provide damage quantification to the extent it exists within Plaintiff's possession or knowledge.") Plaintiffs supplemented their interrogatory response after this order, but that response provides none of the information required by Rule 26(a)(1).

Plaintiffs' portrayal of themselves as impoverished State agents without the resources necessary to respond to discovery is pathetic and disingenuous. Plaintiffs are represented in this action by 23 attorneys from four private law firms, the Attorney General's office and the Office of the Secretary of the Environment. These attorneys have boasted in hearings about having spent over $4 million in expenses on this case. *See* Transcript of Hearing on Dec. 15, 2006, at 125, lines 2-5. If the Plaintiffs and their army of contingency fee lawyers have the resources to spend millions of dollars trying to generate "proof" to support their far-reaching claims, it strains credulity to believe they lack the resources to comply with Rule 34.

Plaintiffs' blanket objections should be stricken and Plaintiffs should be ordered to produce all documents responsive to these requests.

### C. Generic References to All Documents Previously Produced Do Not Satisfy Rule 34

In those rare instances where Plaintiffs' "responses" to the April 25 discovery requests contain something more than unfounded objections, Plaintiffs merely reference hundreds of boxes of documents "previously produced" by Plaintiffs. *See* Ex. 1, Pltfs. Response to RFP Nos. 2, 5, 8, 9, 10, 11, 12, 13, 14, 19, 28 and 29. For example, in response to Tyson's requests for specific agreements or orders referenced by Plaintiffs in their responses to RFAs, Plaintiffs directed Defendants to search 212 boxes of documents produced at OWRB and ODEQ. *See* Ex. 1, Pltfs. Response to RFP Nos. 2. Similarly, in response to Tyson's request for documents that comprise the evidence Plaintiffs claimed to possess regarding the amount of poultry litter applied in the IRW by contract growers for each defendant, Plaintiffs instructed Tyson to search for that information within the 18,000 pages of "grower and applicator records" previously produced from ODAFF and 12 boxes of documents, one hard drive and 25 CDs of materials included in their "Court Ordered Scientific Productions." *See* Ex. 1, Pltfs. Response to RFP No. 7.

Plaintiffs refuse to produce or to identify responsive documents; they insist Tyson search a mountain of documents.

Under Rule 34, Plaintiffs had two options in responding to Tyson's April 25 Requests for Production. They could have produced for inspection responsive documents as they were kept in the ordinary course of business. Offering inspection of warehoused documents does not satisfy Rule 34. *Am. Int'l Specialty Lines Ins. Co. v. NW1-1, Inc.*, 240 F.R.D. 401, 410-11 (N.D. Ill. 2007). In the alternative, Plaintiffs were required to "organize and label [the documents] to correspond with the categories in [each] request." FED. R. CIV. P. 34(b)(i). Plaintiffs did neither.

Plaintiffs' "agency document" production and their obligation to identify the location of documents responsive to each Rule 34 request has been the subject of a previous motion to compel and a prior order of this Court. *See* Cargill Defs. Motion to Compel (Dkt. No. 1054); May 17, 2007, Order (Dkt. No. 1150). In fact, this Court has held that the "agency document productions" to which Plaintiffs have referred Tyson in response to these discovery requests do not satisfy the requirements of Rule 34. *See* May 17, 2007, Order (Dkt. No. 1150). The Court found "the documents in this case have been removed from their normal files and placed in boxes for review." *Id.* at 7. The Court further observed "the improbability that parties in the ordinary course of business 'routinely haphazardly store documents in a cardboard box.'" *Id.* at 7 (*quoting T.N. Taube Corp. v. Marine Midland Mortgage Co.*, 136 F.R.D. 449, 456 (W.D.N.C. 1991)). As a consequence, the Court ordered Plaintiffs to supplement their agency productions to "insure that a complete and fully accurate index shall be provided showing the box number which responds to each specific [Rule 34 request]." May 17, 2007, Order, p. 7 (Dkt. No. 1150).

Plaintiffs claim that the "court-ordered" production of the "scientific data" they generated was an "ordinary course of business" production. Unless Plaintiffs' "business" is bringing lawsuits, those documents were not produced "as they are kept in the usual course of business."

Thus, Plaintiffs' response to Tyson's request for production is a flagrant and willful violation of this Court's May 17, 2007, Order (Dkt. No. 1150). Plaintiffs refuse to provide Tyson with documents organized and labeled to correspond to the information sought in Tyson's Request for Production Nos. 2, 5, 7, 8, 9, 10, 11, 12, 13, 14, 15, 19, 28 and 29. Further, documents responsive to these requests are not identified on any of the document production indices provided by Plaintiffs. Plaintiffs' blanket references to hundreds of boxes of documents haphazardly produced falls far short of their obligations under Rule 34 and violates this Court's Order. Accordingly, Tyson requests that Plaintiffs be ordered to produce documents organized and labeled to correspond to each request.

## IV. CONCLUSION

Plaintiffs' refusal to produce the documents and evidence they claim to possess violates the Federal Rules and this Court's Orders. Plaintiffs' objections are unfounded and the generic references to a morass of documents "previously produced" violate Rule 34. To the extent Plaintiffs claim the documents requested are privileged, they have failed to satisfy their burden to substantiate those privilege claims. Accordingly, Plaintiffs should be ordered to produce the documents requested and to identify the specific documents responsive to these requests that were included in their prior productions.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I certify that on the 5th day of September 2007, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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I also hereby certify that I served the attached documents by United States Postal Service, proper postage paid, on the following who are not registered participants of the ECF System:

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